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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FRANK B. JAMES, *et. al.*,

Petitioners,

v.

JAMES G. WATT, *et. al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTION PRESENTED

Do individual Indian plaintiffs have standing to assert a claim under the Indian Nonintercourse Act?

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sec. 4, 1 Stat. 138; 25 U.S.C. 177)
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Other Authorities:

F. Cohen, Handbook of Federal Indian Law (1982 ed.)

STATEMENT OF THE CASE

In 1974, the Wampanoag Tribe of Gay Head (hereinafter "the Tribe") and its duly organized and elected tribal government, the Wampanoag Tribal Council of Gay Head, Inc. (hereinafter "the Tribal Council"), brought suit against the Town of Gay Head and several other Defendants (primarily individual landowners) to recover tribal lands taken from the Tribe in violation of the Indian Nonintercourse Act of 1834, 25 U.S.C. sec. 177. That Act imposes a general restraint against alienation of tribal lands without the consent of Congress.

Since the filing of this suit, the parties have entered into protracted settlement negotiations. These negotiations recently resulted in a

proposed settlement that the Tribe has voted overwhelmingly to accept. The remaining parties have indicated acceptance in principle and it is anticipated that a formal written settlement will be entered into shortly. Upon approval of the Massachusetts General Assembly and the United States Congress the Tribe's claim will be extinguished and the settlement terms implemented.

Petitioners are a minority group of tribal members who disagree with the negotiating policies adopted by the Tribe and the terms of the tribally approved settlement. Having failed to convince the tribal membership of the merits of their position, they now seek to thwart the

Tribe's official action by maintaining this appeal.

ARGUMENT

I. INDIVIDUAL TRIBAL MEMBERS CAN HAVE NO SEPARATE INTEREST IN TRIBAL LAND AND HAVE NO PROTECTABLE INTEREST UNDER THE INDIAN NONINTERCOURSE ACT

Johnson v M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), first defined the nature of "Indian title." Under this doctrine the discovering European sovereign held the ultimate fee but the tribe residing in the area held a continuing "right of occupancy" which could only be extinguished with authority granted from the sovereign. Id. at 573. The right of occupancy was recognized as a tribal right and not an individual right. The Cherokee Trust Funds, 117 U.S. 288, 309 (1886); Cherokee Nation v. Journeycake, 155 U.S. 196 (1894). Johnson v. M'Intosh

also established that Indian title could only be extinguished upon prior approval of the sovereign and after proper conveyance by treaty from the appropriate Indian tribe. 21 U.S. (8 Wheat.) at 574.

The United States, as successor in interest to the first discovering European sovereign, now holds the fee simple title to Indian lands - subject to each tribe's right of occupancy. Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810). These early principles remain as the cornerstones of the concept of original Indian title. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

The Indian Nonintercourse Act (herein INA) was meant to statutorily

incorporate and make clear these basic principles of Indian title. (Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 138; see also 25 U.S.C. sec. 177.)

The Petitioner asserts that an individual tribal member can seek the protections afforded under the principles of Indian title and the INA. This position, however, ignores the basic principle that Indian title is tribally held. An individual member of a tribe has no right against the tribe to any specific part of tribal property. Northern Cheyenne Tribe v. Hollowbrest, 425 U.S. 649 (1976); The Cherokee Trust Funds, 177 U.S. 288, 308 (1886). An exception to this rule occurs when some designated interest in tribal land is

specifically set aside for a tribal member by virtue of a treaty, federal statute or under tribal law. It is only under these special circumstances that a member has any divisible interest in tribal property. F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 606. "A member's right to tribal property is no more than prospective and incohate unless federal or tribal law recognizes a more definite right." Id.

Petitioner relies heavily upon Jones v. Meehan, 175 U.S. 1 (1899), to support his contention that the INA applies to conveyances by individual Indians, but this case only applied to lands covered under the exception outlined above. In Jones v. Meehan a

tract of land was set aside for one of the principle signatory chiefs to a treaty with the Red Lake and Pembina bands of Chippewa. It was the title to this specifically designated land, and not to the remaining tribally held land, around which the dispute centered. The opinion did not deal with the ability of individual tribal members to assert the protections of the INA for tribally held lands.

The opinion did note, but did not hold, that the early INA language referring to "any Indian" referred to lands held pursuant to the above exception. There is no indication in the court's opinion, or any other cited source, that individual tribal members had an enforceable right under

the INA.

This case involves a tribal decision to bring an action and settle its claim based upon majority rule. None of the petitioners have a claim nor do any of them allege that they have a claim that falls within any of the above indicated exceptions. As such the Petitioners do not have standing, the ruling below was correctly issued and the Petition must be denied.

II. THE COURT MUST NOT PERMIT A TRIBAL MINORITY TO CONTROL THE DECISION OF THE TRIBE.

The essence of Petitioner's position is that they disagree with the tribal decision to settle a land claim under the INA. There is nothing in the record, and it is not alleged,

that the present tribal governing body is not properly constituted or that the decision to accept the settlement was not properly reached. The Petitioners simply disagree and wish to judicially impose their will on the tribal majority. This they cannot do.

The powers of Indian tribes extend over both their numbers and their territory. United States v. Mazurie, 419 U.S. 544, 557 (1975). This Court has specifically recognized the authority of a tribe to control the conduct of litigation in the face of a minority within the tribe who oppose a tribe's litigation decisions. Pueblo of Santa Rosa v. Fall, 273 U.S. 315 (1927); F. Cohen, supra at 247. The Congress has expressed support of

tribal control over its own internal matters in the Indian Self-Determination Act, 25 U.S.C. sec. 450.

In this case the Tribe has carefully examined its legal position and has explained that position to its full membership. After careful vote the Tribe overwhelmingly approved the settlement. The Tribe has spoken and this Court must not disturb their determination at the behest of a dissident minority.

CONCLUSION

There is no fundamental disagreement between the circuits regarding the ability of individuals to bring an action under the INA.

There is agreement that individual Indians have no such right. Epps v. Andrus, 611 F.2d 915, 917 (1st Cir. 1979). A close examination of the early cases reveals that the nature of Indian title did not permit such an action unless it lay within narrowly drawn exceptions which are not here applicable.

In addition to this fatal defect, the Petitioners are requesting that this Court usurp the Tribe's right to make decisions that are binding in the full tribal membership. Such interference would fly in the face of this Court's settled practice to respect tribal decision-making absent a congressionally imposed restriction. This the Court must not do.

Respectfully submitted,

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